

TRANSPORTATION REPORT

From:

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To: The Montana Wheat & Barley Committee

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Trans-Atlantic Container Pricing Is Headed Up

Maersk Imposes New Trans-Atlantic Rate Hikes

Maersk Line's ocean freight rates from the Mediterranean and North Africa to the United States and Canada will increase by \$300 per container from Oct. 1, the carrier said August 31st.

Is The Economy Continuing To Look Up? There are signs!

Manufacturing Makes First Gain in 18 Months

Manufacturing activity expanded in August when compared with the previous month, for the first time in 18 months, according to the latest Manufacturing ISM Report on Business, which surveys supply executives.

Freight Index Reaches 2009 High

A closely watched index of U.S. shipping, signaling gathering strength in the domestic economy, advanced to its highest point in nine months in August.

Short Line Traffic Accelerates

Freight traffic at small North American railroads in July pushed up to its highest level since March 7, as short lines, like major carriers, enjoyed a continuing recovery from the lows of spring and early summer.

Class I Rail Freight Pushes Higher

Major U.S. railroads enjoyed the highest bulk carloadings in five months during the week ending Aug. 15, propelled by 2009 peak volume in scrap and metal ores needed in early stages of manufacturing, and the strongest rail shipments of finished vehicles since early spring.

Prince Rupert Container Volume Surges 124 Percent

The Asia to Chicago and Memphis container traffic of the Port of Prince Rupert, British Columbia, and its sea and rail partners, is on an upswing other North American ports have yet to experience.

New STB Chairman is Sworn In

The third Surface Transportation Board member, Daniel R. Elliott III was sworn in Aug. 13 as the Board's chairman, pledging to bring an open mind and sense of fairness to the Board's economic regulation of railroads.

Elliott, 46, served for 16 years as associate general counsel to the United Transportation Union - a major railroad union. Earlier, he practiced at law firms in Washington and Cleveland. He graduated from the University of Michigan with a degree in political science in 1985 and earned a law degree from Ohio State College of Law in 1989.

He was nominated to the Board by President Barack Obama on July 20, 2009 for a four-year term expiring Dec. 31, 2013. He was confirmed by the U.S. Senate on Aug. 7, 2009.

Elliott became the fifth chairman of the Surface Transportation Board, which was formed in 1996 as the successor agency to the Interstate Commerce Commission.

In his confirmation hearing before the Senate Commerce, Science and Transportation Committee, he said he would use his chairmanship to bring more harmony to the often contentious relationship between shippers and railroads and bring more openness and speed to the Board's processes.

Court of Appeals Rejects RR's Appeal of STB Small Rate Case Rules - But NS Files An Appeal To Appeals Court's Ruling

This case has its origins in the fact that the U.S. Railroads did not like the Board's set up of the Three Bench Mark - Small Rate Case Rules - arguing that too many shippers will be allowed to challenge rates under the new system - (Editor's Note: so far only two cases have ever been brought forward and only one has gone to a decision). The railroad's talk a good game - about understanding the desire of the Congress to address the captive shipper's lack of fairness in the railroad market place and enhancing the ability of small rate cases to be subject to regulatory review but their record indicates they continue to try and thwart - each and every avenue for shipper access to regulatory oversight. This appeal was originally filed in 2007 by a host of U.S. Railroads and defended by the STB. The captive shippers numbering 27 groups banded together to intervene in this appeal - to allow for constructive pleadings on behalf of captive shippers¹.

In mid-June, the D.C. Circuit released a 26-page decision in their review of the Board's Small Rate Case rules. The Court affirmed the Board on all counts, rejecting both the shippers' and the railroads' arguments challenging the Board's decision. It is an extremely difficult task to get an Federal Administrative Agency overruled - as the standards are very high for overruling - namely the Agency has to be proven to have acted 'arbitrarily or capriciously.'

The shippers' arguments received the large majority of the court's attention, particularly the arguments that we raised regarding the inadequacy of the relief limits. The bottom line here was deference. The Court began by noting that the "shippers bring an intriguing but ultimately unavailing challenge" to the Board's decision on relief limits. Decision, p. 8. The Court then goes into some detail in the following pages, analyzing the shippers' arguments. Decision, pp. 8-10. The analysis reveals that the Court understood our arguments. However, the Court

¹ The National Industrial Transportation League; National Grain and Feed Association; American Chemistry Council; The Fertilizer Institute; The Alliance For Rail Competition; Colorado Wheat Administrative Committee; Colorado Wheat Growers Association; Consumers for Rail Equity; Idaho Barley Commission; Idaho Wheat Commission; Idaho Grain Producers Association; Montana Wheat & Barley Committee; National Association of Wheat Growers; National Barley Growers Association; Nebraska Wheat Board; Nebraska Wheat Growers Association; North Dakota Grain Dealers Association; North Dakota Public Service Commission; North Dakota Wheat Commission; Oklahoma Wheat Commission; South Dakota Wheat Commission; South Dakota Wheat, Inc.; Texas Wheat Producers Board; Texas Wheat Producers Association; Washington Wheat Commission; and The Honorable Brian Schweitzer, Governor of Montana.

indicated that the Board sufficiently addressed those arguments. Decision, p. 11. The Court admitted that the Board's analysis was "qualitative" rather than "quantitative," but indicated that such a "qualitative" analysis was appropriate, in light of the need to make a "judgment call" in a matter of "policy." Decision, p. 12. The Court then discussed in some detail the shippers' arguments regarding the need for the shipper to forego a significant portion of relief in a range of cases under the Board's chosen relief caps, but deferred to the Board in light of the "ambiguity inherent in this statutory language," which requires the Court to "uphold the Board's interpretation unless it is unreasonable." Decision, p. 14.

The Court also rejected the shippers' challenge to the Simplified SAC procedures and the Board's failure to test those procedures, Decision pp. 16-18, again primarily on the grounds of deference.

The Court similarly rejected all of the railroads' challenges, the key one (lack of notice about the use of the most recent four years of data) because the railroads failed to exhaust their administrative remedies. Decision, pp. 19-21. The other railroad arguments were also dismissed on the grounds of deference.

All in all, the Court's decision leaves the matter for the Congress to decide in the bill which is being considered by the Senate Commerce and House T&I Committees. We do not believe that the panel's decision raises issues that would justify a petition for reconsideration to the full Court of Appeals, which are not favored, or the even more extraordinary action of a petition for cert to the Supreme Court.

In late July, Norfolk Southern filed a Petition for Panel Rehearing or Rehearing En Banc in the Court of Appeals for the DC Circuit regarding the Court's denial of the railroads' appeal of the STB's small rate guidelines decision. NS has set forth two grounds in support of its request for a rehearing: (1) NS challenges the finding that the Court was not required to consider the railroads' claim that the time lag in the Waybill Sample data was not subject to proper notice and comment under the APA, because the railroad's did not raise this claim before the STB on reconsideration of the agency's initial decision. NS argues that this finding is inconsistent with Supreme Court precedent and other decisions of the DC Circuit; and (2) NS claims that this same finding of the Court conflicts with the Administrative Procedure Act and creates uncertainty in the DC Circuit regarding appeals of administrative agency decisions.

There is no need for the interested shippers to respond to NS' petition, unless the Court expressly asks for a response. However, even in that case, the

STB can serve that role. However, putting aside the Waybill Sample time lag issue, the underlying principle that is the subject of the request for rehearing, namely, whether an issue must be raised in the proceedings before the agency before they can be subject to review at the DC Circuit, is one that could work both to our benefit or detriment depending on the circumstances.

The Congress is now teed up to address the shipper concerns on small case rules and setting reasonable limits of recovery.